SUPREME COURT, U. S.

FILED

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No. 1073

In the

Supreme Court of the United States

OCTOBER TERM, 1965.

PEARL KOZAK,

Petitioner,

vs.

MORRIS KOZAK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

Because of the numerous inaccuracies and omissions contained in the Petition for a Writ of Certiorari, Respondent deems it necessary to reply to Petitioner's statement of the Questions Presented and to set forth additional pertinent facts not contained in her Statement of the Case.

QUESTIONS PRESENTED

1. Petitioner claims that the master in chancery denied her procedural due process by hearing the greater portion of the evidence and concluding the hearing at a time when she was trying to find a lawyer and was without representation. As Respondent will show, there is no support in the record for the contention that Petitioner was trying to find

a lawyer at the time of the hearing. To the contrary, the record clearly shows that she voluntarily chose to proceed without counsel.

2. Petitioner claims that the master denied her procedural due process by failing to continue the hearings until she had been given a reasonable and adequate opportunity to secure an attorney. However, the record shows that Petitioner has employed or consulted with eight separate counsel, that the hearing was continued on four occasions so that she could obtain new counsel, that she made no request for a continuance to the master on September 22, or 23, 1966 and that she stated to the supervising trial court on September 20, 1966 that she proposed to try the case herself.

3. Petitioner also claims that the master denied her procedural due process by stating that she was going to lose the case better than a lawyer could. As the Illinois Appellate Court pointed out, that statement was obviously an innocent and jocular remark and Petitioner's attempt to take it out of context and ascribe substance to it is absolutely without foundation. Furthermore, such a contention pointedly ignores the fact that, as Petitioner admitted in her Brief before the Illinois Appellate Court (pp. 2, 63), the master's ruling on Count I of the two-count complaint was favorable to her and against Respondent.

4. Petitioner's final contention that the master denied her procedural due process by failing to use the precise words "proposed" or "tentative" when he sent her a copy of his report and gave her notice of the time within which she could file objections is raised for the first time before this Court and is, therefore, not timely. Moreover, the proposition completely ignores the clear language contained in the notice and suggests a duty upon the master

which cannot possibly be supported either by reference to Illinois law or under any constitutional theory.

STATEMENT OF THE CASE

Petitioner is a former school teacher and an intelligent, well educated, articulate woman. (M. Tr. 52, R. C129, Petitioner's Illinois Appellate Court Brief, p. 31) From the commencement of this lawsuit to and including the filing of her Petition for Certiorari in this Court she has been represented by or consulted with no less than eight separate counsel. Six of these counsel appeared of record on her behalf during some part of the proceeding. (R C121-131)

The greater portion of this case was heard by the master on September 22 and September 23, 1966. On four separate occasions prior to September 22, 1966, the case had been continued by the master for the specific purpose of accommodating Petitioner's desires to discharge counsel. (R. C122, 123; M. Tr. 80) On September 20, 1966, the case appeared on the progress call of the supervising trial court. Petitioner herself answered the call. At that time, knowing of the September 22 setting before the master, she stated in open court that she proposed to try the case herself because she "could not trust lawyers". (R. C124) On September 22, 1966, when the case proceeded before the master, Petitioner did not request a continuance.

On October 11, 1966, Respondent's counsel sent Petitioner a copy of his memorandum stating Respondent's position, attaching thereto copies of several memoranda of authorities, all of which were filed with the master. Petitioner did not reply. (R. C125) On November 10, 1966, the master served copies of his report upon all parties along with the following notice:

> "PLEASE TAKE NOTICE that I have prepared my report in the above cause, and copies thereof are appended hereto and served upon you. *The rules of court require that any litigant objecting to any of the findings or conclusions of this report is required to file written objections with the master. Therefore, all of you are hereby notified that objections, if any, to this report are to be filed with the undersigned master in chancery until and including Tuesday, November 22, 1966,* in the office of the master, Room 1800, 33 North LaSalle Street, Chicago." (R. C94, emphasis supplied)

Petitioner, who does not deny she received the report and notice, filed no objections. Under those circumstances, as the Appellate Court held, the report is conclusive under Illinois law, *Matthews* v. *Whitethorn,* 220 Ill. 37, 77 N.E. 89 (1906).

The master's report specifically states that ". . . defendant [Petitioner] persisted in handling the cause before the master without the assistance of an attorney." (R. C74-75) It is also worthy to note the master's specific admonition to Petitioner during the course of the hearing that she should have an attorney (M. Tr. 176) and his comment that he was giving Petitioner a liberal interpretation of the rules of evidence. (M. Tr. 157)

On November 29, 1966, Respondent's counsel mailed a notice to Petitioner that he would appear on December 2 and present a proposed decree to the trial court. Petitioner did not appear and the decree was entered on that date. (R. C100) The decree, adopting the master's report, found in favor of Petitioner as to Count I of the two-count complaint. (R. C100-110) On December 9, 1966 Petitioner had retained counsel and filed a petition, *verified by her on December 6, 1966,* (and thus obviously prepared by counsel on or before that date) in which she represented *inter alia* that she had first learned of the entry of the decree on

December 5, 1966. In that petition, she requested the trial court to vacate the decree *"upon such conditions as the Court may consider fair and equitable"* and to grant her leave to file exceptions to the master's report in lieu of objections. (R. C112, 113, Emphasis Supplied) That verified petition makes no allegation whatsoever concerning the master's conduct of the hearing or to the effect that Petitioner was denied the right to counsel and forced to try the case herself.

The trial court did not initially deny to petition to vacate the decree. In fact, it specifically ordered that the decree would be vacated and that objections could be filed if Petitioner complied with the conditions which the trial court set. (R. C119) But instead of complying with the very order she herself had sought, Petitioner asked the trial court to modify the conditions. (R. C138-141) When the trial court would not, and after two extensions of time to comply were granted (R. C165, 169), she refused to comply with the conditions. The trial court, specifically finding that she had refused to comply, denied the petition on February 16, 1967. (R. C185) Petitioner calls this portion of the case below a mere "controversy over . . . conditions". (Petition, p. 7) However, it is most important to note that she was able to obtain counsel *one day after she learned that the decree had been entered,* that she remained represented continuously thereafter, and that, despite her counsel's representation to the trial court that she would comply with the conditions (R. P. January 12, 1967, pp. 22, 23, 24), she refused to comply. (R. P. February 16, 1967, pp. 10-11) The Illinois Appellate Court specifically held that the conditions were equitable. (Petition, p. 27)

Respondent must also comment on Petitioner's inuendoes which, while not reaching the status of accusations, imply that Respondent's counsel "interfered" with Petitioner's "right" to adequate defense. (Petition, p. 5, 14) The record clearly shows the absolute lack of foundation in such a charge and we believe it a gross insult not only to counsel but to this Court that such inuendoes, completely unsupported by fact, should be contained in a Petition before the highest Court in the land.

Finally, Petitioner's Statement of Facts does not disclose that, after Leave to Appeal was denied by the Illinois Supreme Court on November 20, 1968, she filed a motion before the Honorable Walter V. Schaefer, a Justice of that Court, seeking a stay of mandate on the ground of her proposed Petition to this Court. That motion was denied on December 11, 1968. (Appendix; pp. 1a, 2a)

ARGUMENT

Respondent submits that examination of the record and the law discloses, without question, that no federal question of substance is involved in this case and that there is no basis upon which this Court's discretionary power to grant certiorari might be invoked.

The basic contention of the Petition for Certiorari is that Petitioner was somehow denied the right to counsel. The foundation upon which this claim is built is the assertion that Petitioner was unsuccessfully trying, at various pertinent times, to find an attorney. Yet both the record and the Petition as well are *absolutely silent* as to what efforts she made, what lawyers she contacted or what they said to her. All that appears is that eight separate counsel *were* involved in her behalf and that the master granted her four continuances to obtain new counsel. Certainly, these facts, coupled with Petitioner's statement to the trial court two days before the hearing that she proposed to try the case herself, the absence of a request that the master continue the hearing, her failure to respond to the statement of Respondent's position, to the master's notice calling for objections or to the notice of presentment of the decree, her *immediate* retention of counsel upon entry of the decree and her refusal to comply with the trial court's conditions at a time when she was represented, belie a claim that Petitioner was "denied" the right to counsel. Indeed, it is clear from the record that Petitioner could have obtained counsel any time she so desired, was given more than adequate opportunity to do so, and that she deliberately did not secure counsel until after the decree had been entered. No other conclusion can be drawn but

that Petitioner consciously chose to try the case herself. Indeed, the basic absurdity of Petitioner's position becomes evident when one examines page 11 of her Petition where it is stated: "It is not Petitioner's contention that the Master should have refused to proceed with the hearing until she had obtained a lawyer." However, at page 12, Petitioner states that "[the master] should have refused to complete the hearings until Petitioner had been given an adequate and reasonable opportunity to secure a new lawyer". Aside from the most basic inconsistency of these propositions, it is clear that they are not grounded in fact. As the Illinois Appellate Court stated:

> "She had been given a month to retain an attorney but her efforts had failed. To require the master to delay the proceedings further until the defendant retained counsel, which was a total uncertainty, would be to give the defendant an advantage which is not extended to other litigants." (Petition p. 23)

Even if it might be said that the record so much as suggested a denial of Petitioner's right to counsel, it is clear that any claim of alleged constitutional violation has been waived. No constitutional questions were raised in the petition to vacate the decree or at any time during the post-decretal proceedings. During this entire period of time, Petitioner was represented by counsel. After the petition to vacate the decree was denied, Petitioner took appeal to the Illinois Appellate Court. Only after that Court had affirmed the decree did she unsuccessfully seek leave to appeal to the Illinois Supreme Court and raise claims of a constitutional nature. It is basic that constitutional questions must be raised at the earliest opportunity or else they are waived. *Shepard* v. *Baron,* 194 U.S. 553, 48 L. Ed. 1115 (1904), *Johnson* v. *United States,* 318 U.S. 189, 87 L. Ed. 704

(1943), *Chicago Sandoval Coal Co.* v. *Industrial Commission*, 301 Ill. 389, 391-2 (1922), *Village of Riverside* v. *Kuhne*, 397 Ill. 108, 110-11 (1947). In fact, it has been specifically held that an appeal to the Illinois Appellate Court, rather than a direct presentation of constitutional questions to the Illinois Supreme Court, is a waiver of all such claims. *Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Company* v. *City of Chicago*, 242 Ill. 178, 185 (1909), *McDonald* v. *City of Spring Valley*, 285 Ill. 52, 55 (1918). Of course, this Court will not consider an alleged infringement of constitutional rights not raised in the state court, *Young* v. *Masci*, 289 U. S. 253, 77 L. Ed. 1158 (1933), and Respondent submits that the so-called constitutional questions were not properly raised in the state court, that they have been waived by Petitioner and that they are not properly before this Court.

Even were it to be assumed, *arguendo*, that the record supported Petitioner's claim that she was trying to find an attorney at the time of the master's hearing and was denied a continuance to obtain counsel, and that a constitutional question was properly before this Court, it is quite clear that no federal question of substance has been raised in any event. The very cases cited by Petitioner are clear support for this proposition. Thus, in *Crooker* v. *California*, 357 U. S. 433, 2 L. Ed. 2d 1448 (1958), this Court found *no* denial of due process in the admission of a confession signed by petitioner after his request to obtain counsel had been refused. In reaching that result, this Court stressed the intelligence, age and education of the Petitioner, a 31 year old college graduate with one year of law school, and his awareness of the right to remain silent.

In *Chandler* v. *Fretag*, 348 U. S. 3, 99 L. Ed. 4 (1954), this Court found a denial of due process where petitioner,

a negro of little education, on trial for a breaking and entering charge to which he had entered a guilty plea, was suddenly charged as an habitual criminal, a charge carrying a penalty of life imprisonment. The charge was made without prior notice and petitioner's request for a continuance to obtain counsel was summarily denied.

In *Pennsylvania ex rel Herman* v. *Clandy,* 350 U. S. 116, 100 L. Ed. 126 (1956), this Court ruled that a hearing should be granted on a petition for Habeas Corpus which alleged that petitioner, 21 years old with only six years of formal education, had been held incommunicado for three days, that he and his family had been threatened with physical harm and that, as a result of all of this, he signed a confession covering 30 separate charges without being informed of the nature of the charges, the amount of the possible sentence or that he had a right to counsel.

In re Oliver, 33 U.S. 257, 92 L. Ed. 682 (1948) involved a man, who, while testifying before a "grand jury" consisting only of a state court judge, was suddenly charged with contempt, immediately convicted and sentenced to jail. The charge, "trial" and conviction were held in secret and petitioner had no opportunity to counsel or to prepare a defense. The basis for the contempt conviction was that petitioner's testimony conflicted with that of a prior witness who had testified in secret and without the presence or knowledge of petitioner and the "belief" of the judge and his advisors that petitioner was not telling the truth. This Court held that due process had been violated.

Ex parte Chin Loy You, 223 Fed. 833 (D. Mass. 1915) involved an alien whose deportation had been ordered on the basis of testimony taken at a completely separate proceeding outside the presence of the alien or any representative on his behalf and testimony taken at "his" hearing to

which his counsel was refused admission, despite a specific request. The attorney was also denied the right to communicate with his client until after the hearing had been completed. Due process was held to have been violated.

In *United States ex rel Castro-Louzan* v. *Zimmerman,* 94 F. Supp. 22 (D. Pa., 1950) an alien, unable to speak English, without money and without any acquaintances in the city, was ordered deported following a hearing at which he was not represented by counsel. It appeared that he did have a substantial defense to the deportation. The court held that, under those circumstances, the authorities' granting of 48 hours to obtain counsel at his own expense and without any assistance was insufficient and that the alien had been denied due process.

Roux v. *Commissioner of Immigration,* 203 Fed. 413 (9th Cir., 1913) held that petitioner, an alien who had been ordered deported, was denied due process where the authorities, while telling her that she could have counsel, also told her that the case against her was weak and that counsel was unnecessary. The alien was not represented at the hearing and the court reasoned that the authorities had, in effect, overpursuaded, induced and unduly influenced her not to employ counsel.

In *Hyun* v. *Landon,* 219 F. 2d 404 (9th Cir., 1955), petitioner's deportation hearing included the taking of depositions in Hawaii. Notice of the depositions was given and petitioner's counsel was informed that petitioner could be present or represented and could submit interrogatories to the witnesses. The court *rejected* petitioner's argument that due process had been violated because he could not afford to go or to send his attorney and that the govern-

ment should have either brought the witnesses to petitioner or paid for transportation and noted that, because deportation hearings are *civil* in nature, there is no absolute right to be confronted by adverse witnesses.

Finally, *Brinkerhoff-Fariz Trust & Savings Co.* v. *Hill,* 281 U.S. 673, 74 L. Ed. 1107 (1930), a taxation case, held merely that due process could be violated through state judicial action as well as through the legislative, executive or administrative branches. The facts are not even remotely connected with those at bar.

It is obvious that not one of the elements involved in those cases where constitutional rights were held to have been violated are present here. Petitioner is not an ill-educated or ignorant person. She reads, writes and speaks perfect English and even a cursory review of the record discloses her high degree of intelligence and strong will. As this Court held in *Crooker* v. *California,* 357 U.S. 433, 2 L. Ed. 2d 1448 (1958), these are most important factors in determining whether due process has been violated. Certainly, Petitioner makes no claim that she was held incommunicado, subject to physical threats or denied the right to confront witnesses against her. Respondent submits that if this Court has never before determined a claim of the sort here alleged, it is only because it is patently absurd. Certainly, no federal question of any substance at all is presented.

Petitioner's subordinate contention that the master denied her due process by commenting that she was going to lose the case better than a lawyer could is pursued with befittingly little vigor. Indeed it is difficult to believe that Petitioner is serious in this allegation. As the Illinois Appellate Court pointed out, the remark was innocently

made near the end of the hearing and Petitioner's attempt to ascribe substance to one remark in a transcript of close to 350 pages borders upon the absurd. (Petition, pp. 23-4) Moreover, the Master's ruling on Count I of the Complaint was favorable to Petitioner. It is indeed difficult to perceive how due process was violated here.

Finally, Respondent must comment on Petitioner's proposition that due process was violated because the master's notice did not use the precise words "proposed" or "tentative" in describing the attached report. As indicated above, this proposition was not advanced before any of the Illinois state courts and, consequently, is clearly barred by *Young* v. *Masci*, 289 U.S. 253, 77 L.Ed. 1158 (1933). Furthermore, the Illinois court rule and case cited in support of this contention cannot possibly be read to require the use of these precise words. In view of the clear language contained in the master's notice concerning objections, it is indeed difficult to perceive what else the report might have been if not "proposed" or "tentative". Moreover, Petitioner's argument concerning this point appears circular to say the least. If, as she contends without support, she was unable to obtain counsel at this point in the case, it is difficult to understand how the specific labeling of the report as "proposed" or "tentative" would have been of any assistance. If, on the other hand, Petitioner means that, had the report been so denominated, she *would* have then obtained counsel, she has indeed tacitly admitted, as the record shows, that she could have obtained counsel any time she chose.

CONCLUSION

Respondent respectfully submits that no grounds for Certiorari exist in this cause, that the opinion of the Illinois Appellate Court and the ruling of Illinois Supreme Court are correct and that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

NO. 41698

IN THE SUPREME COURT OF ILLINOIS - MAY TERM, A. D. 1968

MORRIS KOZAK,

Plaintiff - Appellee,

vs.

PEARL KOZAK,

Defendant - Appellant.

APPEAL FROM THE APPELLATE COURT OF ILLINOIS,
FIRST DISTRICT

HONORABLE JUSTICES Lyons, Burke and McNamara Presiding.

MOTION TO STAY MANDATE

Now comes the Defendant - Appellant, Pearl Kozak, by Gromer, Abbott & Wittenstrom, her attorneys, pursuant to Supreme Court Rule 368(c), and moves the Court as follows:

1. That the Court enter an Order staying the mandate of the Supreme Court of Illinois and of the Appellate Court of Illinois, First District, in this cause for the reason that Defendant - Appellant, Pearl Kozak, intends to seek review by the Supreme Court of the United States.

2. Petition for leave to appeal was denied by the Illinois Supreme Court in this cause as of November 20, 1968. Unless stayed, the mandate of this Court may issue by December 11, 1968.

3. Defendant - Appellant, Pearl Kozak, intends to file a Petition for a Writ of Certiorari to the Supreme Court of the United States on or before February 20, 1969.

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NO. 41698

IN THE SUPREME COURT OF ILLINOIS - MAY TERM, A. D. 1968

MORRIS KOZAK,

Plaintiff - Appellee,

vs.

PEARL KOZAK,

Defendant - Appellant.

APPEAL FROM THE APPELLATE COURT OF ILLINOIS,
FIRST DISTRICT

HONORABLE JUSTICES Lyons, Burke and McNamara Presiding

ORDER

This cause coming on to be heard now upon the Motion to Stay Mandate filed this date by Defendant - Appellant, Pearl Kozak, due notice having been given to the attorneys of record for Plaintiff - Appellee, Morris Koza, and the court being fully advised in the premises,

IT IS THEREFORE ORDERED by this Court that the motion is denied. ~~mandate of this Court and of the Appellate Court of Illinois, First District, in this cause be, and it hereby is, stayed until final disposition of this cause by the Supreme Court of the United States.~~

Dated: December 10, 1968.

ENTER: Walter V. Schaefer
Justice of the Supreme Court of Illinois

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